| Neutral Citation No: [2023] NICC 15 | *Ref:* [2023] NICC 15 |
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| | *ICOS No:* 21/089414<br>21/007938<br>21/059533 |
| *Judgment: approved by the court for handing down*<br>*(subject to editorial corrections)** | *Delivered:* 09/05/2023 |

**IN THE CROWN COURT FOR THE DIVISION OF BELFAST**
**(SITTING IN COLERAINE)**

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**THE KING**

**v**

**JONATHAN PLAYFAIR**

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**SENTENCING REMARKS**

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**HHJ RAFFERTY KC**

[1] I am required to sentence the defendant on three separate Bills of Indictment. The defendant has been assessed as meeting the threshold for dangerousness under the 2008 Order. I confirmed with counsel that dangerousness was under consideration pursuant to *R v EB*. The individual Bills and facts are set out below and the factual matrix is complex. I am obliged to all counsel for their detailed submissions and have incorporated for completeness significant portions of the openings of Crown Counsel. I have done so because the detailed nature of the various behaviours of the defendant are highly relevant to my later analysis.

[2] Before commencing these sentencing remarks I would like to thank the young victims in this case for their Victim Impact Statements. I will not read their remarks into the record, but I wish them to be told that I have read them and thank them for taking the time to set out the traumatic effects that the defendant's actions have had upon them. I wish them to be told that as the victims in these cases they are blameless and the only shame or blame that attaches is to the defendant. The victims are to be commended for coming forth and seeing this matter to its conclusion.

[3] Bill of Indictment number 21/059533 consists of 15 counts of possession of an indecent image of a child (IIOC), contrary to Art 15(1) of the Criminal Justice (Evidence etc) (NI) Order 1988, all dated 4 May 2020.

***Facts of Offending***

[4] On Thursday 12 March 2020 an acquaintance of the defendant attended Musgrave PSNI station to report that the defendant had breached his bail conditions by being in possession of a mobile phone with Internet and camera facilities.

[5] As a result of the information he provided to police, in relation to the content he had seen on the defendant's phone, police conducted a search of the defendant's address on 4 May 2020, where he was located, and his phone was seized.

[6] An Initial Digital Examination dated 15/9/20 identified a specimen total of 15 videos and images, comprising 5 for each Category A, B & C, representative of the total number of IIOCs and forming the evidential basis of the counts on the indictment; as advised in a letter to the defendant's representatives by letter of 21 July 2021.

[7] Also identified in the depositions in the summary of the Initial Report are the total number of images and videos as follows:

Cat A - 19 images and 13 videos

Cat B - 23 images and 6 videos

Cat C - 96 images and videos

Total 138 images and 21 videos

[8] The Investigating Officer, D/Con McCrossan, identified AB, the sole subject of the material, a female known to her from previous dealings, DOB 11 July 2003, 16 years old at the time of the offences. The defendant was also identified in some of the images from his facial features.

[9] The various sexual activities identifiable from the material were put to the defendant at interview on 03/12/20 (page 8); these included images of the female in underwear, and images of her breasts and bottom, in posing positions; acts of oral sex, penetrative sex, digital penetration, kissing and masturbation.

[10] The defendant made no comment in response.

[11] The second Bill of Indictment is ICOS No: 21/007938 and contains 3 counts:

Count 1 Blackmail, contrary to section 20 of the Theft (NI) Act 1969

Count 2 Possession of an indecent image of a child contrary to Art 15(1) of the Criminal Justice (Evidence etc,) (NI) Order 1988

Count 3 Distribution of an indecent image of a child, contrary to Art 3(1)(b) of the Protection of Children (NI) Order 1978

*Facts of Offending*

[12] On 11 August 2018, police received a report from the injured party CD, who informed police of the history of her friendship with the defendant through various platforms originating on a Facebook account '*Jonathan JB Playfair'* commencing in 2017. These exchanges were described by her as occasionally flirty, but mostly friendly.

[13] Shortly after the commencement of her exchanges with the defendant, she received a friend request from a '*James Hall'* on Facebook. From the commencement of her chat exchanges with Hall, the content was of a sexual nature. Hall repeatedly made requests for an image of her exposed breasts to which she eventually agreed, and the injured party noted that he had saved the image and taken a screenshot. She then requested Hall to delete the image which he refused to do. Thereafter there was no contact for several months with either account, until 10 August 2018. On that evening, both the defendant and Hall contacted her on Facebook regarding the image. It was at this point that the injured party first suspected that the defendant and Hall accounts were operated by the same person.

[14] The following day, 11 August 2018, Hall communicated to the injured party that unless she sent further explicit pictures of herself, he would upload the original image of her exposed breasts to Facebook. Both the Playfair and Hall accounts sent through the image to reiterate the threat. The injured party challenged both to delete the image, but this was refused. As well as the Hall blackmail demand, she also received voice note messages from Playfair alluding to him going into Snapchat with the picture.

[15] Subsequently, she was then notified through her Facebook account that she had been tagged in a picture, which was the original picture of her exposed breasts and was posted on the Hall Facebook page. She removed the tag from the picture and attempted to delete it, but the request was unsuccessful; thereafter she reported the matter to Facebook and contacted police.

[16] Police investigated the information provided on the two accounts from the injured party, and further information received from the NCA. It was established at the time of the demand, both accounts were being accessed from an identical IP address, which was traced to a Virgin Media account in the name of the defendant's mother and home address.

[17] The triage examination of the defendant's phone has the details of the injured party's phone number, saved as a contact using her first name, and examination of the injured party's phone found the defendant's contact details and screenshots taken by CD at the time of the image and history of her contacts with the two Facebook accounts '*Playfair*' & '*Hall.*'

[18] The injured party was 17 years old at the time of these events. The date of birth provided on her Facebook profile indicated that she was 18 and she had not informed the defendant otherwise.

[19] The injured party in her statement has detailed how the episode has made her upset and nervous and fears that the picture will be posted to other people and put online again. This has of course caused her embarrassment and her anxiety was also heightened by subsequent contacts from the defendant.

[20] On Bill of Indictment 21/089414 the defendant has pleaded guilty to:

Counts 1-3 Three offences of sexual touching of a child by way of penetration between 1 June and 2 November 2018, contrary to Article 16(2) of the Sexual Offences (Northern Ireland) Order 2008.

Counts 4-5 Two offences of causing or inciting a child to engage in sexual activity between 1 June and 2 November 2018, contrary to Article 17(1) of the 2008 Order.

Count 6 Possession of an indecent photograph of a child on 19 November 2018, contrary to Article 15(1) of the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988.

Counts 7-8 Two offences of sexual communication with a child between 1 June and 3 November 2018, contrary to Article 22A of the 2008 Order.

Counts 9-10 Blackmail between 1 June and 2 November 2018, contrary to Article 20 of the Theft Act (Northern Ireland) 1969.

Counts 13-14 Disclosure of private sexual photographs and films with intent to cause distress between 1 October 2018 and 1 October 2019, contrary to section 51(1) of the Justice Act (Northern Ireland) 2016.

The remaining counts were left on the books not to be proceeded with.

[21] All offences concern EF as the injured party. Her date of birth is 20 June 2004, and she was 13/14 at the time of the offences. The defendant's date of birth is 14 June 1999. He was aged 19 at the material time.

***The Facts***

[22] The defendant and EF met through a mutual friend. This friend knew the defendant was 19 years old and states that she told him that EF was 14 years old, coming 15. As set out above, EF was actually 13 and turned 14 close to the start of the indictment period. She stated that the defendant did become aware of her age.

[23] In her ABE interview carried out on 14 January 2019, EF explained that she met the defendant on a number of occasions and after a couple of weeks, they went to Lisburn leisure centre as it was cold outside and they ended up in the seating area for the pool. They went to a small room and the defendant sat on a chair and pulled her towards him and asked would she have sex with him. She stated that he pulled her trousers down, pulled his trousers down, placed her on top of him and had sex with her. She said that it lasted about five minutes and it felt sore and stingy to her afterwards. She was 13 years old at the time and then became 14 soon after. This is count 1.

[24] Subsequent to this, she said the defendant sent her a photograph of his penis and told her to send a picture back. He told her that if she did not, he would text her mum. He asked her to send a photograph of her vagina which she sent. She was aware that he 'screen shot' this image from Snap chat and then said that he would tell her Mum that she had sent photographs. She described that she felt intimidated as he kept asking her to do stuff that she did not want to do such as send photographs of herself naked. She described another occasion that the defendant sent a photograph of a penis to her and asked her to send one back. When she declined, he said if she did not, he would text her Mum again. She sent a picture of her vagina back to him describing that she was wearing pants in the image, but part of her vaginal area could be seen. This is part of the factual basis of the incitement to engage in sexual activity and sexual communication charges at counts 4, 7 and 8 respectively.

[25] At some point, EF tried to break up with the defendant but said that he turned up at her school and they started talking again. She said the next time they were out, they were walking down the Lagan and she gave him oral sex in some bushes near the Civic Centre. This is count 2. When she got home, he sent her the video that he had taken of her performing oral sex. This footage is the indecent image referred to in count 6. She asked him to delete it, but he refused. She said she was upset and she stopped talking to the defendant in and around this time.

[26] A couple of days after this she started being contacted by a Facebook profile in the name Megan Gas asking her to stay away from her boyfriend, Jonathan. This profile eventually sent EF the film of her performing oral sex on the defendant through Facebook. She was aware that this profile had also contacted her Mum saying that EF had been sleeping around. EF and her mother were not aware but subsequent investigations demonstrate that it was the defendant who was also operating this Facebook account. The video is the subject of the possession of an indecent image at count 6.

[27] EF met with the defendant on other occasions and, on one of these, they had sex for a second time at the leisure centre. Again, she said that he pulled her shorts down and had lowered his own trousers. He pulled her on top of him and they had sex. This is count 3.

[28] At some point, EF's mother became aware of messages being sent to EF by the defendant and her mother contacted the defendant. This aspect is dealt with in the summary of EF's mother's evidence below. However, in her ABE interview, EF proceeded to refer to the defendant calling her mobile telephone using 'no caller ID' and leaving messages asking her to call him. As a result of this, EF changed her telephone number. It was in and around this time, EF became aware that a girl in her class had received the footage of her performing oral sex on the defendant and, within a short time, a number of people in her class had also received it. In relation to the dissemination of the video amongst the class, there is no evidence that the defendant sent it to each individual. However, it is clear that in addition to sending it to her mother and sister, he sent it to at least one person outside of EF's family and this led to its wider dissemination in her class. (Counts 11 and 12) EF was also contacted by a Facebook profile in the name of James who sent her the video. She later found out that this was a fake account as the photograph was of someone else that she knew. She did not, however, realise it was the defendant who was actually operating this Facebook account.

[29] Despite EF changing her telephone number, the defendant was able to get her new telephone number and continued to telephone call her. Telecommunications data was obtained as part of the investigation, and this is addressed below. One aspect that EF described was that the defendant would take her telephone when they met and would keep it. He did not give a reason for taking her phone, but if she did not give it to him he would say that she must be hiding something. He couldn't access her phone, however, as he did not know her password.

[30] A further ABE was carried out on 23 April 2019. She was asked if she had access to the defendant's social media accounts (as he had suggested in his first police interview) and she said that she did not.

[31] EF was using a telephone with the number ending 052. On 18 December 2018, she received 70 calls from a withheld number. This was after EF had first gone to speak to police on 14th December 2018. She obtained a new number (ending 193) and continued to receive numerous calls, including 21 between 1 and 4 April 2019 (see paragraph 24 below regarding call data from the defendant's telephone number). EF's telephone was seized as part of the investigation as SP5 and the report is contained at page 25 of the witness statements. The messages that were retrieved show:

(i) On 29 September 2018, the defendant asks EF if she had been cheating on him and says:

> "I hope the fuck u haven't been cheating on me from we have been going out cuz see if u have am acc texting your mum and I'll tell her it's all true xx." (page 36)

(ii) On 30 September 2018, the defendant texts:

> "if I find out your lieing she won't be the only one texting your mum just saying I stunk up for u and this are you pay me xx." (page 35)

(iii) On 1 October 2018, there is a message from EF in which she asks the defendant why he would send nude pictures of her to her mum. She concludes saying that she wants to kill herself and cannot cope with her life like this. On the same day, she sends messages saying that she thinks they rushed it (a sexual relationship) and she wished she had never done anything like this. She messages:

> "…I'm not in the right place rn cuz I'm really not well u always threatening me with my nudes and telling me that your gonna text my mum how do u think that makes me feel x" (page 34);

(iv) The messages continue on the same evening (page 33) with the defendant saying he wants the fighting to stop. EF states that she feels like a tramp, and she would be so ashamed if her mum or dad found out and she has let her family down. The defendant messages that he will not "use" her nudes because he does care about her. There is a message from EF referring to "Megan" texting her mother and asking if she has said she will leave her and her mum alone. The defendant replies stating, "Yeah she said if u sent me a picture of u in your underwear, she will but I know you won't do that xx." The defendant persists, stating, "she wants you to send me a picture then she will or she said she going to keep it up xx." EF replies, "Just say I sent u one or something or I acc will kill myself omg xx." He replies, "she won't believe me….and she said something about ss me on a call and she wants a video of us talk dirty or she's going to text everyone she can find xx" (page 32). This message forms the basis for the Blackmail at <u>count 9</u>;

(v) On 8–9 October 2018, the defendant messages EF that he is going to the police station and she asks him not to (page 31). He states that he is going to give them her name. She messages, "R u happy that I wanna die I hope your proud x." He replies that he does not care, and he might as well go to jail and drop himself in it as he did this all for nothing (page 30). On the evening of 9 October, he tells her he is sitting in the car outside the police station (page 29);

(vi) On 13 October, the defendant accuses her of lying about having contact with someone on snap chat and states, "…don't know why your lieing but sweet am just going to drop myself in it with your mum right now then that's it x." Later that evening, he messages "u have 5 minutes to ring if not then acc going to be a dick again xx." EF messages that it is blackmail and the defendant then messages, "times up x", "your acc going to make me start" and "u really don't want me to start and send this x" (page 29) (Blackmail <u>count 10</u>)

(vii) The message continues on 14 October 2018 with the defendant stating, "be dirty one last time and I swear over anything I will always be happy for u x." She replies that she does not want to do anything like that again until she is 16. He persists in a further message asking "to do both" and says it won't take him long to 'cum' followed by, "if I want this to work just help me xx." (page 28) (Incitement to a child to engage in sexual activity – count 5)

(viii) On 16 October, the defendant messages, "send me a picture x" and, later, "cuz wen am home your in big trouble I can't lie to your mum x." EF states that if he texts her mum she will go to police and the defendant replies, "you go to the police I'll go to your mum now if your being like that x."(page 28) (Blackmail count 10)

(ix) On 17 October 2018, EF messages that she cannot believe he sent 'that' to her mum and the defendant replies, "I haven't sent it yet but am getting ma shoes on and going to the police x." (page 28);

(x) On 19 October 2018, the defendant messages EF, "I'll be outside your school the day bestie xx." EF asks why and the defendant replies, "I have had enough of u your mum's getting fucking texted can't believe u xxxxxx"……"see fucking out no more being nice had enough not getting me no were xxxxx" (page 27)

[32] On 18 February 2019, EF made a witness statement in which she set out that in February 2019 she had been added to a group chat on Snapchat which had about 20 individuals in the group. She noticed that one of them was the defendant's profile name. He had bail conditions not to contact her but started to send her messages saying, "Doggy shut up trying to get me done for rape. If u got raped u wouldn't be another boy wouldn't even let u kiss u never touch u now leave." He then posted a photograph of himself with the word "Streaks" in front and sent a further message saying, "[EF] I'll be at your door after." She immediately blocked everyone in the group so she could not receive any more messages and she was terrified he would come to her door.

[33] On 29 March 2021, EF made a further witness statement in which she stated that around the time that she made a report to the police she had been receiving telephone calls from a withheld number for a number of months but had not answered them. Her sister noticed her telephone ringing and told her to answer the phone. EF did and put it on loudspeaker. She recognised the caller's voice to be the defendant and he said, "Good try getting the police to my door. It didn't work. Better luck next time." She said she felt scared and upset by the call.

[34] EF's mother is GH. She made a statement that was part of the police investigation (page 3). She stated that EF turned 14 on 20 June 2018 and from around that time her behaviour changed. She was aware that her daughter had a boyfriend called Jonathan, but she did not know much about him. On 13 September 2018, she

received a Facebook message from "Jonathan Playfair." The first message said that there was something that EF had not been telling her that she had a right to know and asked her to telephone a number ending in 179. She received eight further messages from this account until 2 November 2018 but did not reply. On 14 September 2018, she also received a message from a profile name, "Megan Gas." The first message asked her if she was EF's mum and was she aware if she went out with someone. On 16 September 2018, she received a further message, "Your daughter is a dirty cunt sending nudes to people" and "Makes me sick." GH spoke to her daughter who initially told her that she had not done anything but then said that she had had sex with Jonathan. The messages from Megan Gas continued (Exhibits page 17-27) and on 2 November 2018, this profile sent her a video of her daughter performing oral sex on a male (Ex. Page 28). She was so upset that she replied saying that she was going to the police (count 13). The evidence demonstrates that 'Megan Gas' was actually the defendant.

[35] GH also contacted the profile Jonathan Playfair and said to delete any videos or pictures of EF, or she would go to the police (Exhibits page 9). The defendant replied saying he had not got any pictures and asking what was going on as he has not done anything. He denied taking photos or videos of EF. GH asserted that he had taken videos and pictures as EF had told her (Exhibits page 11). The defendant said that EF had sent them (to him) and he did not ask (for them). When GH said the video he had taken had been sent to her, the defendant replied, "She told me to take that video plus she kept saying she was always horny on the phone and she wanted me to always make her cum" (Exhibits page 12). He continued that EF won't talk to him and he has lost a "really good friend" and he asked what she had said about him (Exhibits page 13).

[36] EF's sister received a message containing footage on Facebook from a profile that she did not know. She realised it related to her sister and so did not watch it. The same footage was sent twice more on the same day (count 14).

*Arrest and Interviews*

[37] The defendant was arrested on 19 December 2018. At that time, his telephone was seized as SP3 (but in June 2019 a further telephone was seized as CW2). The defendant was first interviewed on 19 December 2018. He said he knew EF through her cousin stating he met her on 20 June 2018. He said that they spoke on the phone a couple of times and then EF added him on Facebook and started texting him. He gave her his number and she kept ringing and texting and 'didn't give up.' He said he had been in a relationship with her for about two months in the Summer. He said the relationship was good although there were lots of arguments. He said he thought EF was 17. He said she told him this as did her Mum and all of her friends, and it was on her Facebook. He was asked if he had any sexual contact with EF and he said no. He then said he made a video and that was it. He said EF initiated the contact. He said that she gave him a 'blowjob' and got him to hold the phone. He said he recorded it on her telephone, and she then sent it to him. He said he deleted it but claimed she

kept sending it to him. He said she has access to his Facebook and Snapchat and was sending pictures. He denied sending the recording to anyone else.

[38] The defendant was asked about 'Megan Gas' and he said that this was a person he met on holiday in Spain who now lives in Belfast. He said he was close and would see her a lot. He said he knew Megan and EF were 'slobbering' at each other. He denied sending the video to Megan. He said EF had access to his phone and would add him to group chats.

[39] He maintained they did not have sex but confirmed oral sex. With regard to the latter incident, he said that she pulled him into the bushes, untied his trousers and got down on her hands and knees. She handed him her phone and asked him to video it. He maintained he was not aware of the video being sent to anyone else, including EF's mother. He said that she told him she was horny all the time and would talk dirty. He said that she told him to look at his Snapchat and she had sent him a recording of her sitting playing with herself.

[40] A further interview was carried out on 21 July 2020. At the outset of this interview, the defendant's representative indicated he was not content with disclosure and had advised the defendant to answer no comment. During the interview, the messages that had been found between him and EF were read out including those that referred to having sex with each other.

*Telephone Evidence*

[41] In addition to the messages referred to above, the defendant's telephone was examined and footage of EF performing oral sex on the defendant was located. As it depicts penetrative activity, it is Category A. A constable in the cyber support unit was able to ascertain that the file had been made on 16 July 2018 by the defendant's phone at 17:21 hours and was 35 seconds long by the device SP3 (count 6).

[42] Investigations with Facebook demonstrated that the same IP address was used in relation to a Facebook profile in the defendant's name Jonathan Playfair, in the name James Hall and also in the name Megan Gas (Ex. Page 35 – 76). This IP address was traced back to the defendant's home address (Ex. Page 147). It is the prosecution case that the defendant was operating each of these profiles.

[43] Call data was obtained for the telephone number attributed to the defendant (ending in 179). This demonstrated that between 18 December and 19 December, the defendant telephoned EF approximately 170 times and between 28 December 2018 and 25 May 2019, there were 438 calls (Ex. Page 80 – 93).

*Defendant's Personal Circumstances*

[44] The defendant is a 23 year old male with a complex background which is laid out in the Pre-Sentence Report. He seems to have lived with his grandparents prior

to his current incarceration. He left mainstream education in primary 4 and moved to a Special School. His education was fragmented, and he was moved between special schools. He was diagnosed as having "a moderate learning difficulty and behavioural problems." Probation and Trust services have attempted to have assessments carried out, but the defendant has declined to engage. To some extent, this deficit is overcome by the reports of Dr Bownes and Dr Davies. I need not rehearse the entirety of the contents. Suffice to say, the defendant has documented references to moderate learning difficulties. He has developmental delay in literacy and numeracy as well as speech. He appears to have an IQ of 54. Returning to the Pre-Sentence Report, the defendant has no employment history and reports emotional health difficulties with self-harm. He is under the SPAR regime in HMP Maghaberry.

[45] The sexual assessment portion of the report is telling. The defendant reports few sexual partners, one of whom is his first partner, and the mother of his child. He met this lady in Torbank School, and she has learning difficulties. PBNI have advised that there was a Non-Molestation Order in place due to allegations of sending messages to this lady through numerous social media accounts. It is of note that this NMO was later removed. However, the defendant describes one of his "relationships" as having been with the 13 year old victim on Bill of Indictment 21/089414. The author of the report comments:

> "The court may have concern at his continued minimisation of his deviant behaviours and subsequent targeting of vulnerable female teenagers to meet his sexual needs."

He advises the author of the report that he does not consider himself "guilty" and pleaded guilty upon advice. The author of the report comments:

> "It is clear, that Mr. Playfair is not willing to accept any level of responsibility for the sexual offending against [EF] and instead engaged in victim blaming behaviour. He did not show any insight into the pathway to offending, nor the motivation behind such offending".

[46] It is further noted in the PSR that the "victim" in the images forming the basis for Bill of Indictment 21/059533 is identified as AB. She is known to police and Social Services as a highly vulnerable individual. It appears tolerably clear that the defendant and AB were in some form of clandestine personal relationship.

***Issues in Sentencing***

[47] It will by this stage have become clear that this is a highly complex sentencing exercise. There are three separate Bills of Indictment involving three separate victims. There are overlapping criminal behaviours. Some of these behaviours have sentencing guidelines and some do not. So far as I am aware, there is a paucity of

guidance on Blackmail outside of the paramilitary context (See *A-G Ref (No. 5 of 2004) R v Thomas Potts* [2004] NICA 27) in this jurisdiction. There is certainly little on online "sextortion." In addition, the defendant's own issues together with the issue of "dangerousness" under the 2008 Order present significant difficulty. It is to these issues that I now turn.

***Images***

[48] In *A-G Ref (No. 8 of 2009) R v McCartney* [2009] NICA 52 the Court of Appeal had occasion to consider the sentencing guidelines applicable to the downloading, making and possession of indecent images of children. The then Lord Chief Justice stated:

> "[4] This court has not issued guidelines setting out the appropriate range of sentence for offences of this nature but for some years now sentencers have relied upon the guidelines issued by the English Court of Appeal in *R v Oliver and others* [2002] EWCA Crim 2766. We agree with that court that the primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it. The well-established categorisation of indecent material set out in Oliver is now widely used by police forces in the United Kingdom including the PSNI to assess the increasing seriousness of the material.
>
> (1) images depicting erotic posing with no sexual activity;
>
> (2) sexual activity between children, or solo masturbation by a child;
>
> (3) non-penetrative sexual activity between adults and children;
>
> (4) penetrative sexual activity between children and adults;
>
> (5) sadism or bestiality.
>
> [5] The downloading or possession of a large quantity of material at levels 4 or 5 is a serious offence and for an adult offender without previous convictions after a contested trial a custodial sentence of between 12 months and three years will generally be appropriate. The Sentencing Guidelines Council in England and Wales has

> now suggested a slightly lower range, but we see no reason to depart from the range set out in Oliver. The age of the children involved may be an aggravating feature and assaults on babies or very young children are particularly repugnant because of the fear or distress they may have induced in the victim. The manner in which the images are stored on the computer may indicate a high level of personal interest in the material. Distribution of material at any level will be a serious aggravating factor and distribution of images at levels 4 or 5 would justify sentences in excess of three years. Where the distribution is for commercial gain or by way of swapping substantially increased sentences are appropriate."

[49] It is important as a sentencer when faced with an offence type to reflect that sometimes guidelines are not directly applicable. The presentation of offending in McCartney was the online downloading of images. The offences which the defendant faces with respect to these images are not comparable. In this case, the defendant had direct agency in bringing the images into existence through coercion and blackmail. Accordingly, where the possession of images are produced or obtained through coercion and possessed thereafter or disseminated it seems proper to regard them as an aggravating factor in the overall assessment of totality.

*Contact Offences*

[50] In *R v DM* [2012] NICA 36 the Court of Appeal in this jurisdiction had occasion to consider sentencing guidelines for the Article 16 Offence of Sexual Activity involving penetration with a child between 13–16. Having noted at paragraph 11 that consecutive sentencing was appropriate then went on to review cases from the Court of Appeal in England and Wales:

> "[12] There are three decisions of the English Court of Appeal which are helpful in determining the appropriate range in a case of this type. R v Corran [2005] EWCA Crim 192 was a case in which the court gave preliminary non-prescriptive guidance in connection with the new offences created by the Sexual Offences Act 2003. The court concluded that earlier authorities suggesting a sentence on a guilty plea of 15 months' imprisonment where there was consensual sexual activity between a man in his twenties and a girl under the age of 13 would remain of assistance. In R v Barrass [2006] EWCA Crim 2744 the court took Corran into account in imposing a sentence of 18 months imprisonment on a plea where the defendant was 26 and the victim 14 and the sexual intercourse had occurred at a party where alcohol was consumed. R v Frew [2008]

> EWCA Crim 1029 was decided after the promulgation of the Sentencing Guidelines Council report. That was a case of a single act of consensual sexual intercourse between a 29 year old man and a girl of 15 and a half as a result of which the girl became pregnant and underwent an abortion. The offender pleaded guilty. The court noted that the Sentencing Guidelines themselves referred to the need for flexibility and variability and a sentence of 2 years was reduced to 18 months taking into account Corran and Barrass."

[51] What is clear from *R v DM* and a review of these authorities is that the focus is on culpability and harm. Culpability will be considered with respect to age difference; the use of alcohol or other substances; coercion. This is not an exhaustive list. Harm will be considered with regard to consequences for the victim – corruption of a victim; pregnancy; venereal disease – again this is not an exhaustive list.

***"Sextortion" – Online Blackmail***

[52] As has been pointed out above, there are no non-paramilitary sentencing guidelines available from the Court of Appeal in Northern Ireland. In *A-G Ref (No.5 of 2004)* (*R v Potts*) [2004] NICA 27 the Kerr LCJ commented that blackmail cases were always "highly fact specific." Whilst that is true, consistent sentencing requires a frame work based upon Culpability, Harm and Future risk – the so-called *Millbery* approach. The starting point must surely be Baker J in *R v Cioffo* [1996] 1Cr App R (S) 427:

> "Blackmail is always a serious offence. As has been said by this Court in the past it preys on the soul of the victim….. Deterrent sentences have to be passed by the courts when those guilty of these offences are brought to justice."

[52] There is little doubt that in all but exceptional cases, significant custodial sentences will be imposed upon those who engage in Blackmail.

[53] What then of the modern context? An increasingly significant number of Blackmail cases are being dealt with in the Crown Court in Northern Ireland where the Blackmail takes place online or through social media. In *A-G Ref (no. 8 of 2009) (R v McCartney)* [2009] NICA 52 the court commented at paragraph 16:

> "[16] The internet has revolutionised the way in which we live. It has provided us with ready access to information and facilitated social contact. Children have enjoyed many positive educational experiences, but it is in the social sphere that the change has been most marked. An Ofcom survey carried out last year found that 49% of children aged 8 to 17 have an online profile on a social

> network and indeed more than a quarter of 8 to 11-year olds in the United Kingdom also have such a profile. A survey published this week by the University of Ulster found that 48% of P7s use social network sites even though the providers of those sites purport to prohibit children of that age from such use. Although it is clear that there is much that is positive about the internet this case demonstrates the dangers to which children can be exposed as a result of which they may be corrupted or indeed in some cases exploited."

[54] What was true in 2009 is even more true in 2023 and that an offence type such as blackmail is now prevalent in the digital realm would, only a few years ago, not have been conceivable. The breadth of online "sextortion" is wide. It ranges from the use of social media where the offender and victim know each other in real life through to organised online gangs in so-called "troll farms" who stalk the internet accessing computers and devices of the often vulnerable to then exploit those victims to send intimate images which are then used to blackmail them. There have been a number of such cases, where confronted with humiliation, young people have taken their own lives.

[55] Cognisant of the "health warning" provided by the Court of Appeal in *R v McCaughey & Smith* [2014] NICA 61, I have examined the Sentencing Advisory Council's "overarching guidelines" in so far as they may provide guidance on the analysis of Culpability and Harm. The guidelines advise the sentencer to be cognisant of the statutory maximum sentence which is 14 years in Blackmail. It then sets out a generalised and non-exhaustive list of aggravating and mitigating factors. Those that appear most relevant to this offence type are:

***Aggravating***

Planning of offence;
Financial gain;
Abuse of trust/dominant position;
Vulnerable victim;
Prevalence.

***Mitigating***

No previous convictions;
Remorse;
Self reporting;
Cooperation;
Limited awareness or understanding of offence;
Mental disorder/learning disability.

[56] A sentencer is then recommended to consider the totality of the offending in arriving at an appropriate total sentence.

[57] One particular aspect of online Blackmail requires, in my view, to be highlighted. Blackmail is an offence which "preys on the soul." The online threat to a victim that they will stand humiliated or embarrassed in perpetuity given the permanent nature of online publication is a serious threat. Where the spectre of humiliation is made flesh by the blackmailer publishing or disseminating the images then that must be regarded as a very significant aggravating factor. It impacts upon both culpability and harm. The culpability attaching to carrying out the threat must be regarded as high. The Harm that thereafter naturally flows from the "making good on the threat" will require to be assessed on a case by case basis. However, where, in addition to embarrassment or distress it causes the victim to move home; leave work; leave school; or in any significant way impacts upon their life, then harm will be high.

[58] With respect to starting points and sentencing ranges, this offence type given its wide ranging nature presents difficulty. Adopting ranges from similar 14 year offences types, where there is high culpability or high harm sentencing ranges may well run from 12 months to 6 years with a likely starting point of three years. Where there is high culpability and high harm a range from four to nine years with a starting point of at least five years represents a likely range. Sentences above 10 years may well be reserved for cases where there are exceptionally aggravating factors. For example, on culpability where the offence involves systematic targeting by serious and organised crime gangs; or on harm, where a vulnerable victim is seriously harmed or kills themselves.

*Discussion of Sentence and Totality*

[59] Turning to the current sentencing exercise. I identify the following aggravating factors:

(a) The defendant has clearly targeted and "groomed" (I use this word in the normal behavioural sense rather than in the offence based sense).

(b) There are three separate Bills, with three separate victims.

(c) All the victims, to a greater or lesser degree, have some degree of vulnerability.

(d) In one case, the blackmail was used to commit a contact offence and was then recorded to produce additional material for blackmail.

(e) In one case, the "spectre was made flesh" and the material was disseminated which caused the victim to leave her place of education.

[60] I have, equally, identified the following mitigating factors:

(a) The defendant was in his late teens when the offences were committed.

(b) The defendant has had a significant degree of upset and difficulty in his life.

(c) The defendant has a very low IQ and suffers from a learning disability.

(d) The defendant pleaded guilty. (The only delay in his pleas was occasioned by the commissioning of mental health reports during the pandemic.)

[61] Were I to adopt a consecutive sentencing approach it is apparent that, given the gravity of some offences, I could easily reach double figures as a starting point. That approach, in my view, would breach totality and require artificially low sentences for some offences. I intend to impose concurrent sentences and will "headline" on the Blackmail offences. I make it clear, if I am wrong in this approach, I would have reached exactly the same sentence by consecutive sentences. I have concluded that taking all three Bills into account, having allowed for the aggravating and mitigating factors above, that the minimum total sentence that I would have imposed had the defendant been found guilty by a jury is one of nine years. Applying the Court of Appeals guidance in *R v Toher & Phair* [2023] NICA 18, I am satisfied that it is proper to give the defendant a full reduction of 33.3%. Accordingly, the total sentence is one of 6 years. Before I turn to the sentences, the issue of "dangerousness" is live.

*Dangerousness*

[62] In *R v EB* [2010] NICA 40 the Court of Appeal in Northern Ireland adopted the process for determining "dangerousness" from *R v Lang* [2005] EWCA Crim 2864. At paragraphs 10 the Court set out the relevant procedures and consideration. I need not reproduce those here, save but to say, that I have considered them in my assessment of dangerousness in this case. I am satisfied that the defendant in this case meets the threshold for dangerousness. Foremost in my consideration has been:

(a) The three sets of very similar offending;

(b) The similarity in victim type. Their vulnerability is a significant concern;

(c) The degree of coercion involved in the offending;

(d) The defendant's apparent inability to accept responsibility/process his responsibility for the offending;

(e) The degree to which the defendant presents with little insight or willingness to engage with therapeutic assessments/remedial work.

[63] Accordingly, I find myself entirely in agreement with the assessment of PBNI. Equally, I am satisfied than an Extended Custodial Sentence is adequate to meet the needs of public safety.

[64] Accordingly, the sentences that I impose are as follows:

- On Bill of Indictment 21/059533 which deals with possession of indecent images there will be a sentence of 15 months custody in relation to Counts 1 – 15. All sentences are concurrent.

- On Bill of Indictment 21/007938 the following sentences will be imposed:

  Count 1 – Blackmail there will be a sentence of three years.
  Count 2 – Possession of images – 15 months.
  Count 3 – distributing images – 18 months.

  All sentences are concurrent.

- On Bill of Indictment 21/089414 the following sentences will be imposed:-

  Counts 1-3 reflect penetrative offending and having regard to the factors above there will be a sentence of 21 months.
  Counts 4 and 5 are incitement counts and there will be a sentence of 15 months.
  On Count 6 there will be a sentence of 15 months.
  On Counts 7 and 8 there will be a sentence of 12 months.
  On counts 13 and 14 there will be sentences of 12 months.

[65] Turning to Counts 9 and 10. These are the two Blackmail counts that I have chosen to reflect the headline sentence based upon totality. Accordingly, there will be sentences of 6 years on each count. That will take the form of an Extended Custodial Sentence and the minimum period of extension that I deem necessary, given the issues that have been identified, is one of four years extended supervision.

***SOPO***

[66] I am satisfied that the terms of the SOPO sought are both "necessary and proportionate" within the meaning of *R v O'Hara* [2021] NICA 1. The period will be 10 years.

***Ancillary Orders***

[67] By virtue of the sentences passed you will be subject to the notification requirements of the Sexual Offenders' Registration Scheme and you will be disqualified from working with children and vulnerable adults and placed on the barring list.

Offender levy £50.00.